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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1066

ROBERT W. ALBERS,
Petitioner,

vs.

STATE BOARD OF EQUALIZATION STATE OF CALIFORNIA,
Respondent.

Brief in Opposition

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Respondent, State Board of Equalization of the State of California, opposes the petition for certiorari for the following reasons:

1. *There is no basis for jurisdiction in this court.* The federal issue which petitioner seeks to raise here was not properly raised in the state proceedings and was not passed on by either the trial court or the appellate court.

2. *There is no merit whatsoever to petitioner's claim.* There is nothing unconstitutional in imposing a sales (gross receipts) tax on the receipts of an independent contractor arising from the retail sale of tangible personal property while not imposing the tax on the wages of employees who are not engaged in the business of selling at retail.

ARGUMENT

I. There Is No Basis for Jurisdiction in This Court

This is a suit brought by petitioner seeking the refund of an amount paid to the state as sales tax. Pursuant to the Pre-trial Conference Order, the sole issue in the case was one of statutory construction of the California Sales and Use Tax Law, namely, whether in conducting his business, petitioner was making "sales" within the meaning of section 6006 of the California Revenue and Taxation Code. (Clerk's Transcript, page 24.) Petitioner at no time sought to have the order amended.

Under California law, the pre-trial conference order supersedes the pleadings and controls the issues to be litigated. California Rules of Court, 216; *Thompson v. Guyer-Hays,* 207 Cal.App.2d 366, 24 Cal.Rptr. 461. Accordingly, the trial court properly passed on only the statutory issue and the appellate court properly refused to consider questions not raised by the record.

By failing to properly raise his federal argument in the state proceedings, petitioner cannot set forth any grounds for jurisdiction in this Court. *In re Lamkin,* 355 U.S. 59; *Ferguson v. Georgia,* 365 U.S. 570; *Williams v. Georgia,* 349 U.S. 375.

II. The Tax Here in Question Is Clearly Constitutional

Petitioner is a "commercial draftsman" who produces drawings for his customers for a consideration. The District Court of Appeal held that the production and transfer of possession of a drawing was a "sale" within the statutory definition of "sale" and the gross receipts received by petitioner from such sales were subject to the California Sales tax.

Petitioner apparently contends that there is an unlawful discrimination because the state does not apply the sales

tax to the wages of individuals who, *as employees,* make drawings for their employers similar to those made by petitioner *as an independent contractor* for his customers. There is no merit to that contention. Petitioner, as an independent contractor, constituted a sole proprietorship—a separate business entity. Under California law he was a retailer engaged in selling tangible personal property and was taxable on the exercise of this privilege. An employee, on the other hand, is not engaged in an activity separate from that of his employer and is not considered a separate business entity. *Irvine Company v. McColgan,* 26 Cal.2d 160, 157 P.2d 847. The classification of an individual's rights and duties by whether he is an independent contractor or an employee is one of the oldest, most fundamental concepts in the common-law and statutory law of this country. It cannot now be argued that the classification is not a reasonable one. There is no unlawful discrimination if the legislative classification is at all reasonable. *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 437.

CONCLUSION

For both of the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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